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OCTOBER TERM, 1951

NO. 9.

DONALD R. DOREMUS and ANNA E. KLEIN,
Appellants,

v.

BOARD OF EDUCATION OF THE BOROUGH OF
HAWTHORNE and THE STATE OF
NEW JERSEY.

On Appeal From the Supreme Court of the State of
New Jersey.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA
AS AMICUS CURIAE.

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L

THE PRACTICE OF READING THE BIBLE IN THE PUBLIC
SCHOOLS OF PENNSYLVANIA DOES NOT INFRINGE THE FIRST
AMENDMENT.

Section 1516 of the Pennsylvania Act of March 10,
1949, (Pamphlet Laws of 1949, p. 30), 24 Purdon's
Penna, Stat. Sec. 15—1516, known as the "Public School
Code of 1949", provides:

"At least ten verses from the Holy Bible shall
be read, or caused to be read, without comment, at

the opening of each public school on each school day, by the teacher in charge; Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed,

It will be noted that—

(1) The Act expressly commands that the verses shall be read "without comment". Any exposition or interpretation and any instruction are expressly prohibited.

(2) The act does not direct that the Lord's Prayer be repeated or that any prayer be offered.

(3) The act does not specify any particular version of the Bible, but directs simply that ten verses of the "Holy Bible" be read.

It is therefore within the power of the school authorities or the teachers to avoid reading verses which may not be included in any version of the Bible or are not accepted by parents of children in attendance. As will be shown later, teachers have been instructed to do this.

This section is substantially a reenactment of Sections 1 and 2 of an earlier Act of May 20, 1913, P. L. 226. The Act of 1913, however, contained the following preamble:

"Whereas, The rules and regulations governing the reading of the Holy Bible in the public schools of this Commonwealth are not uniform; and

"Whereas, It is in the interest of good moral training, of a life of honorable thought and of good citizenship, that the public school children should have lessons of morality brought to their attention during their school-days * * *"

Prior to the adoption of the Public School Code of 1949, public schools in Pennsylvania were regulated by the Code of May 18, 1911, P. L. 309.

This earlier code did not contain a provision about reading the Bible in the public schools, but the practice of reading the Bible in the opening exercises of the school day had prevailed in Pennsylvania for many years before.

This practice is discussed on page 3 of the report of Nathan C. Schaffer, Superintendent of Public Instruction of Pennsylvania for the year 1913; as follows:

"BIBLE READING IN THE PUBLIC SCHOOLS.

"The School Code [of 1911] makes no mention of the reading of the Bible. Heretofore this was a question to be decided by the local board of school directors. The last legislature passed an act making the daily reading of at least ten verses from the Holy Bible obligatory in all the public schools of Pennsylvania. The law does not specify what version is to be read. The catholic has as much right to read the Douay version as the protestant has to read King James version, or the Revised version. The teachers have been urged to select passages over which there is no doctrinal controversy. It is not the function of the public schools to teach religion. That should be left to the home, to the Sun-

day school and to the church with its various agencies.

"On the great questions of morality the protestant, the catholic and the jew are in agreement. Passages can be selected to enforce the great truths which lie at the foundation of our civic and ethical life. Helps have been prepared to aid the teachers in making selections suitable for school use during the opening exercises. * * *" (3)

Further light on the history of this practice in Pennsylvania is furnished by the opinion of Judge Edwards of the Common Pleas of Lackawanna County in *Stevenson v. Hanyon*, 7 Pennsylvania District Reports, 585 (1898):

"It is worthy of comment and reflects creditably upon the good sense of the rights of Pennsylvania, that, although our common school system has been in existence for many years, and that, as a general rule, in a large number of school districts throughout the State, portions of the holy scriptures, have been read as a part of the daily opening exercises, nobody up to this time has taken such interest in the question as to secure a decision upon it from our court of last resort."

The practice of reading selections from the Bible in the public schools was held not unconstitutional in several decisions of the Courts of Common Pleas:

Hart v. School District, 2 Chester County Reports, 521 (1895);

Curran v. White, 22 Pennsylvania County Reports, 201 (1898);

Stevenson v. Hanyon, 7 Pennsylvania District Reports, 585 (1898), quoted *supra*;
Stevenson v. Hanyon, 4 Pennsylvania District Reports, 395 (1895), holding that sectarian religious service of any church may not be held in the public schools; see later opinion in last preceding case.

Section 108 of the Public School Code of 1949, 24 Purdon's Penna. Stat. Sec. 108, provides:

"No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee, or employe in the public schools of this Commonwealth."

This same provision was included as Section 2801 of the Pennsylvania School Code of May 18, 1911 (Pamphlet Laws of 1911, p. 309).

Section 1112 (a) of the Public School Code of 1949 further provides:

"That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."

This provision, in substantially the same language, had appeared as Section 1 in the Act of June 27, 1895, P. L. 395. This Section 1 was preceded by the following preamble:

"Whereas, It is important that all appearances

of sectarianism should be avoided in the administration of the public schools of this Commonwealth."

Article 1, Section 3 of the Pennsylvania Constitution of 1874 provides: .

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship."

Article 10, Section 2 of the same Constitution provides:

"No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

For many years before the adoption of the first Amendment in 1791, reading from the Bible had been an established procedure in the opening exercises of both public and private schools.

A few examples in early Colonial times may be cited.

The Dutch at Manhattan had established public schools as early as 1633, and supported them at public expense. A school was established by the Dutch at New Amstel on the Delaware. Reading the Bible and reciting the Lord's Prayer were part of the curriculum.¹

1. Wickersham, History of Education in Pennsylvania, pp. 9-12.

In 1689 William Penn directed the President of the Council of the Province of Pennsylvania "to set up" a public grammar school in Philadelphia, and this school was opened in 1689 to receive both boys and girls as pupils, some of whom paid for tuition and others were free pupils. This school was known as the "Friends' Public School" and later as the "William Penn Charter School". It was open to children of all religious denominations. In 1826 it maintained fourteen charity schools in different parts of the City of Philadelphia.² In 1841, one-tenth of the pupils were children of Friends.³

As early as 1718 Christopher Dock "the pious school master of Skippack" founded a school for the Mennonites.

Morning sessions began with reading, by the pupils, of pages from the Bible.⁴

In 1750 the "Academy and Charitable School of the Province of Pennsylvania", (which later became the University of Pennsylvania), was founded, chiefly by Benjamin Franklin, from funds raised by subscription. This school was nonsectarian.⁵

One of the rules of the school was as follows:

"The Roll being called, someone of the Professors or Tudors who may be appointed for that

2. *Ibid.* 50.

3. *Ibid.* 41-42, 50.

4. Brumbaugh, *Life and Works of Christopher Dock*, pp. 15, 105-106.

5. Mulhern, *History of Secondary Education in Pennsylvania*, pp. 175, 182, 186.

Purpose * * * shall go up into the Oratory in the Morning shall begin the Day by devotionally reading such Portions of the Holy Scriptures as he may select for that Purpose. In like Manner a short Portion of Scripture may be read in the Evening as often as it can be conveniently done. And both Morning and Evening a Conclusion shall be made by Prayer."

The complaining parent in *McCullum v. Board of Education*, 333 U. S. 203, was an atheist.

The religious beliefs of the parents in the *Doremus* and *Zorach* cases do not appear from the opinions.

Freedom of religion includes the right to believe in no religion.

The law recognizes the right of a parent to control the education of his child. However, this right is not absolute or unlimited. Compulsory education laws are an outstanding example.

When the child reaches the age when he can comprehend the great question of religion, he has the right to decide for himself whether he will believe or not believe. The right of the parent to control the early religious training of his child must not be indulged to the point of denying to the child the right to explore the field of religious beliefs and determining for himself what to believe. He has the right to know the teachings of the great religion which has shaped the history of this world and influenced the progress of mankind for centuries.

The parent does not have the right to insist that his child shall grow up in a religious vacuum. Parental predetermination should not be the only influence in molding the religious beliefs of the child. No child should be predestined to a life of unbelief, even by the fiat of his parents.

An unbelieving parent who would attempt to shield his child from all knowledge or influence of religion, would be one of the worst offenders against the freedom of religion. Freedom of religion means the right of every one to decide for himself whether to believe and what to believe.

If a child is not permitted at a proper age to read the Bible or to hear it read, and know of its teachings, how can he decide for himself whether he wishes to be an unbeliever?

In addition to the well considered opinion of the Supreme Court of New Jersey in the case at Bar, we refer to the following decisions in which the practice of reading the Bible in the Public Schools was held not to violate constitutional provisions:

Kaplan v. Independent School District of Virginia, 171 Minn. 142, 214 N. W. 18 (1927);

Wilkerson v. City of Rome, 152 Ga. 762, 110 S. E. 895 (1921);

Knowlton v. Baumhover, 182 Ia. 691, 166 N. W. 202 (1918);

Hackett v. Brooksville Grade School District, 120 Ky. 608, 87 S. W. 792 (1905);

Billard v. Board of Education, 69 Kan. 53, 76 Pac. 422;

Freeman v. Scheve, 65 Neb. 876, 91 N. W. 846,
93 N. W. 169 (Final opinion).—

Church v. Bullock, 104 Tex. 1, 109 S. W. 115;

Pfeiffer v. Board of Education, 118 Mich. 560,
77 N. W. 250;

Spiller v. Inhabitants of Woburn, 94 Mass. (12
Allen) 127;

Donahoe v. Richards, 38 Me. 379;

Board of Education v. Minor, 23 Ohio St. 211.

A knowledge of the Christian religion, including the Bible, has long been recognized as a proper, and even necessary subject in public education.

Without a knowledge of Christianity, history, especially of the European nations, would be incomplete. The Christian religion also was a major influence in the settlement of the American Colonies and in the foundation of the government of the United States.

For many centuries the Bible has been regarded as the principal source of moral teachings.

As was said by Mr. Justice Storey in *Vidal v. Girard's Executors*, 43 U. S. (2 How.) 127 (1844):

“ * * * Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? * * * ” (200)

II.

THE GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA.

In addition to providing for popular rule, the government of Pennsylvania, as conceived and established by William Penn, was marked by three distinctive features.

First, The Christian religion was part of the very foundation of the government;

Second, Religious freedom was guaranteed in each of the important documents or governmental acts which entered into the foundation of the Province;

Third, Provision was made for a system of public schools.

These outstanding features of Penn's Plan are indicated by the following excerpts:

The laws of the Duke of Yorke which were in force from 1676 to 1682 in the territory afterwards embraced within the limits of Pennsylvania contained this provision:

"Whereas the publique Worship of God is much discredited for want of painful & able Ministers to Instruct the people in the true Religion and for want of Convenient places Capable to receive any Number or Assembly of people in a decent manner for Celebrating Gods holy Ordinances These ensuing Lawes are to observed in every parish (Viz.)

"1. That in each Parish within this Government a church be built in the most Convenient part thereof, Capable to receive and accommodate two Hundred Persons." (18)

The Preamble to the Charter granted in 1682 by Charles II to William Penn cites:

"CHARLES THE SECOND, BY THE GRACE of god, King of England, Scotland, France and Ireland, defender of the faith, &c., To all to whome these presents shall come greeting. Whereas our Trustie and well beloved Subject, William Penn, Esquire, sonn and heire of Sir William Penn, deceased, out of a commendable desire to enlarge our English Empire, and promote such vseful comodities as may bee of benefitt to vs and our Dominions, as alsoe to reduce the Savage Natives by gentle and just manners to the love of civill Societie and Christian Religion hath humbley besought leave of vs to transport an ample Colonie vnto a certaine Countrey hereinafter described in the partes of America not yet cultivated and planted. * * *" (81)

The preface to "The Frame of the Government of the Province of Pennsylvania, in America", which William Penn prepared in 1682 for the new Colony recites:

"When the great and wise God had made the world, of all his creatures it pleased him to choose man his deputy to rule it; and to fit him for so great a charge and trust, he did not only qualify him with skill and power, but with integrity to use them justly. * * *

"This the apostle teaches us in divers of his epistles. The law (says he) was added because of transgression: * * * But this is not all, he opens and carries the matter of government a little further: Let every soul be subject to the higher powers, for there is no power but of God. The

powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God. For rulers are not a terror to good works, but to Evil: wilt thou then not be afraid of the power? Do that which is good, and thou shalt have praise of the same.—He is the minister of God to thee for good. * * * (91)

“This settles the divine right of government beyond exception, and that for two ends; first, to terrify evil-doers; secondly, to cherish those that do well; which gives government a life beyond corruption, and makes it as durable in the world, as good men shall be. So that *government seems to me a part of religion* itself, a thing sacred in its institution and end. For if it does not directly remove the cause, it crushes the effects of evil, and is as such (tho’ a lower yet) an emanation of the same Divine Power, that is both author and object of pure religion * * *

* * * * *

“Thirdly, I know what is said by the several admirers of monarchy, aristocracy and democracy, which are the rule of one, a few, and many, and are the three common ideas of government, when men discourse on that subject. But I choose to solve the controversy with this small distinction, and it belongs to all three; any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, and confusion. (92)

* * * * *

“But next to the power of necessity (which is a solicitor that will take no denial) this induced me to a compliance, that we have (with reverence to God, and good conscience to men) to the best of our skill, contrived and composed the FRAME and LAWS of this government, to the great end of all government, viz: to support power in reverence with the people, and to secure the people from the abuse of power; that they may be free by their just obedience, and the magistrates honourable for their just administration: for liberty without obedience is confusion, and obedience without liberty is slavery. * * *

The “Laws Agreed Upon In England”, also prepared in 1682, contain the provision:

“Thirty-fifth. That all persons living in this province, who confess and acknowledge the one almighty and eternal God, to be the creator, upholder and ruler of the world, and that hold themselves obliged in conscience to live peaceably and justly in civil society, shall in no ways be molested or prejudiced for their religious persuasion or practice in matters of faith and worship, nor shall they be compelled at any time to frequent or maintain any religious worship, place or ministry whatever.

“Thirty-sixth. That according to the good example of the primitive christians, and for the ease of the creation, every first day of the week, called the Lord’s day, people shall abstain from their common daily labour, that they may the better dispose themselves to worship God according to their understandings.” (102-103)

"The Great Law", which was the first statute enacted at the first session of the Assembly, held on December 7, 1682, declares:

"Whereas, the glory of Almighty God and the good of Mankind, is the reason & end of government, and therefore, government in itself is a venerable Ordinance of God, And forasmuch as it is principally desired and intended by the Proprietary and Governor and the freemen of the Province of Pennsylvania and territories thereunto belonging, to make and establish such Laws as shall best preserve true Christian and Civil Liberty, in opposition to all Unchristian, Licentious, and unjust practices, (Whereby God may have his due, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.

* * * * *

"Chap. I. Almighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind. * * *

"Be it enacted by the Authority aforesaid, That no person, now, or at any time hereafter, Living in this Province, who shall confess and acknowledge one Almighty God to be the Creator, Upholder and

Ruler of the world, And who professes, him, or herself Obligated in Conscience to Live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his, or her Conscientious persuasion or practice. Nor shall hee or shee at any time be compelled to frequent or Maintain anie religious worship, place or Ministry whatever, Contrary to his, or her mind, but shall freely and fully enjoy his, or her, Christian Liberty in that respect, without any Interruption or reflection." (107-108)

The Charter of Privileges, granted by William Penn to the inhabitants of Pennsylvania and dated October 28, 1701, provides:

"BECAUSE no People can be truly happy tho' under the greatest Enjoyment of civil Liberties, if abridged of the Freedom of their Consciences, as to their religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all Divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Persons, inhabiting in this Province or Territories, who shall confess and acknowledge One Almighty God, the Creator, Upholder and Ruler of the World; and profess him, or themselves, obliged to live quietly under the civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Perswasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Min-

istry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Perswasion." (99-100)

In *Updegraph v. Commonwealth*, 11 S. & R. 393 (1824), the Supreme Court of Pennsylvania held that "general" Christianity was part of the common law of Pennsylvania and sustained a conviction for blasphemy.

In the opinion Mr. Justice Duncan said:

"We will first dispose of what is considered the grand objection—the constitutionality of Christianity for, in effect, that is the question. Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania. Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, William Penn; not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men. William Penn and Lord Baltimore were the first legislators who passed laws in favor of liberty of conscience; for before that period, the principle of liberty of conscience appeared in the laws of no people, the axiom of no government, the institutes of no society, and scarcely in the temper of any man. * * * (400)

* * * The first legislative act in the colony was the recognition of the Christian religion, and establishment of liberty of conscience. Before this, in 1646, Lord Baltimore passed a law in Maryland in favor of religious freedom, and it is a memorable

fact, that of the first legislators, who established religious freedom, one was a Roman Catholic and the other a Friend. * * * (401)

* * * This is the Christianity of the common law, incorporated into the great law of Pennsylvania, and thus, it is irrefragably proved, that the laws and institutions of this state are built on the foundation of reverence for Christianity. * * * (402)

* * * No preference is given by law to any particular religious persuasion; protection is given to all by our laws; it is only the malicious reviler of Christianity who is punished. By general Christianity is not intended the doctrine of worship of any particular church or sect * * * (407)

William Penn's Frame of Government, written in England early in 1682, provided:

"Twelfth. That the governor and Provincial Council shall erect and order all *publick schools*, and encourage and reward the authors of useful sciences and laudable inventions in the said province." (95)
(Emphasis added)

Before sailing for America, William Penn wrote a farewell letter to his wife and children, in which he said:

"Upon the whole matter I undertake to say that if we would preserve our government, we must endeavor it to the people. To do this, besides the necessity of presenting just and wise things, we must secure the youth: this is not to be done, but by the

amendment of the way of *education*; and that with all convenient speed and diligence. I say the government is highly obliged: it is a sort of trustee for the youth of the kingdom; who, though minors, yet will have the government when we are gone. Therefore, depress vice, and cherish virtue, that through good *education*, they may become good; which will truly render them happy in this world, and a good way fitted for that which is to come. If this is done, they will owe more to your memories for their *education* than for their estates." (33-34)
(Emphasis added)

Penn's Plan for the establishment and the maintenance of a system of public schools was carried into the first two constitutions which were adopted by the people of Pennsylvania.

The provisions of these constitutions are as follows:

Constitution of 1776, Sec. 44:

"A school or schools shall be established in each county, by the legislature, for the convenient instruction of the youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices."

Constitution of 1790, Art. VII, Sec. 1:

"The legislature shall, as soon as conveniently may be, provide, by law, for the establishment of schools throughout the State, in such manner that the poor may be taught gratis."

III.

THE FIRST AMENDMENT WAS NOT INTENDED TO ABOLISH RELIGION FROM GOVERNMENT, OR FROM PUBLIC SCHOOLS.

By religion here we mean religion in a non-sectarian sense and without preference of one sect over another.

The First Amendment provides that Congress shall make no law—

“respecting an establishment of religion”

or

“prohibiting the free exercise thereof”

The amendment provides two separate and independent prohibitions. The individual shall have the right to believe in any form of religion or no religion at all. There is, however, no implication that Congress may not recognize religion generally.

What is prohibited is “*an* establishment of religion”, not *the* establishment of religion generally.

By *an* establishment of religion was meant a religion of a particular sect, such as the Episcopal or Congregational. At the time of the adoption of the Constitution, nine of the colonies had made either the Episcopal or Congregational Church their established church.

It was not the intention of the framers of the Constitution to destroy or abolish the foundation of religion which had already existed in all of the colonies, or to do this in order to satisfy the negative thinking of a few atheists. The purpose was to prohibit legislation in the interest of a particular sect.

A state statute making blasphemy a crime, we submit, is not invalidated by the First Amendment.

The instruction involved in *McCullum v. Board of Education*, 333 U. S. 203, was conducted by representatives of the Protestant, Catholic and Jewish churches. The teaching by each denomination was clearly sectarian and was intended to be so.

Religion was the most powerful moving force in the foundation of the American Colonies. This influence is most thoroughly documented in the case of Pennsylvania, but was strongly prevalent in the settlement of the other Colonies.

There has never been a time when religion was not recognized and invoked in the functions of the Federal government and tax monies have not been expended to support religion and religious education and other religious activities.

The first session of Congress, which enacted the resolution submitting the First Amendment to the people, also passed a law to engage and pay for the services of a Chaplain to offer prayers in Congress; and adopted a resolution to call upon the President to recommend to the people a day of public Thanksgiving and prayer to acknowledge "the many signal savers of Almighty God". From the foundation of the Federal government down to the present time, tax paid monies have been used by it to pay for Chaplains in the Army and Navy and in the academies at West Point and Annapolis and to pay for missionaries to spread religion among the Indians. Houses of religious worship have

been exempted from taxation by state governments generally.

These practices have been recognized by numerous authorities.

In *Holy Trinity Church v. United States*, 143 U. S. 457 (1892), it was held that an act prohibiting the importation of aliens under contract to perform labor, did not apply to a contract by which an alien minister agreed to immigrate to the United States and serve as minister of the church.

In the opinion Mr. Justice Brewer said:

“But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because *this is a religious people*. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. * * *

(465)

After quoting the language of many public documents which played an important part in the early history of this nation, Mr. Justice Brewer continued:

“There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; *they affirm and reaffirm that this is a religious nation*. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. The Commonwealth*, 11 S. & R. 394, 400, it was decided

that, 'Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; * * * not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men.' * * *"
(470) (Emphasis added)

In *People v. Ruggles*, 8 Johns. (N.Y.) 290 (1811), the defendant argued that his conviction of blasphemy was a violation of the clause of the Constitution of New York guaranteeing the freedom of religion.

The Supreme Court of Judicature affirmed the conviction, and in its opinion, Chief Justice Kent, said:

* * * * *

"Though the constitution has discarded religious establishments, it does not forbid judicial cognisance of those offences against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation, and weaken the security of the social ties. The object of the 38th article of the constitution, was, to 'guard against spiritual oppression and intolerance' by declaring that 'the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should for ever thereafter be allowed within this state, to all mankind.' This declaration (noble and magnanimous as it is, when duly understood) never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law. It will be fully satisfied by a free and universal toleration,

without any of the tests, disabilities, or discriminations, incident to a religious establishment. * * * the framers of the constitution intended only to banish test oaths, disabilities and the burdens, and sometimes the oppressions, of church establishments; and to secure to the people of this state, freedom from coercion, and an equality of right, on the subject of religion. * * * (296-297)

Terrett v. Taylor, 13 U. S. (9 Cr.) 43 (1815).

Section 16 of the Virginia Bill of Rights . . . , provided:

“That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.” (86)

Previously the Episcopal church had been the established church of the Colony of Virginia.

In 1776 the Legislature of Virginia enacted laws confirming the title of the Episcopal church to its lands and also making the minister and vestry a corporation by the name of the Protestant Episcopal church.

In 1798 the Legislature repealed these statutes and directed the overseers of the poor to sell the lands of the church and appropriate the proceeds to the use of the poor.

This court held this last statute to be in violation of the Virginia constitution. In its opinion, Mr. Justice Story said:

“* * * Consistent with the constitution of Virginia, the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained, by aiding *with equal attention the votaries of every sect* to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. * * *”
(49) (Emphasis added)

Cooley's Constitutional Limitations (8th ed.)—
Page 966:

“Those things which are not lawful under any of the American constitutions may be stated thus:—

“1. Any law respecting an establishment of religion. The legislatures have not been left at liberty to effect a union of Church and State, or to *establish preferences by law in favor of any one religious persuasion* or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. * * *”

Pages 974, 975:

“But while thus careful to establish, protect, and defend religious freedom and equality, the

American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shares of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the same reasons of State policy which induce the government to aid institutions of charity and seminaries of instruction, will incline it also to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable assistants in the preservation of the public order." (Emphasis added)

Story on the Constitution—

Section 1873:

"Now, there will probably be found few persons in this or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage *the Christian religion generally*, as a matter of sound policy as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island, if, indeed, that State be an exception, did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. * * *"

Section 1874:

"Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."

Section 1876:

"*But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men or to punish them for worshipping God in the manner*"

*which they believe their accountability to him requires. * * **" (Emphasis added)

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